

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Grand Canyon Ranch, LLC, an Arizona
limited liability company, f.k.a. Grand
Canyon West Ranch, LLC,

Plaintiff,

v.

Sally Jewell, Secretary, United States
Department of Interior; Mike Pool, in his
official capacity as the Acting Director of the
Bureau of Land Management; and Mohave
County, an Arizona political subdivision,

Defendants.

No. CV-03-02496-PHX-NVW

ORDER

Before the Court is Plaintiff's Application for Preliminary Injunction, etc., (Doc. 177), and related filings (Docs. 178, 186, 193, 198, and 213). For the following reasons, certain construction activities on the New Diamond Bar Road will be temporarily restrained until October 29, 2013, at which time the Court will have a further hearing to determine whether a preliminary injunction is necessary. This order states the Court's findings of fact and conclusions of law pursuant to Rule 52(a)(2) of the Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

A. Background

Grand Canyon Ranch is a western hospitality ranch owned and operated by Grand Canyon Ranch LLC, of which Nigel Turner is the principal owner. It spans 1,200 acres

1 in Mohave County, Arizona, and holds grazing permits from the Bureau of Land
2 Management (“BLM”) over an additional 105,000 acres of surrounding property. It
3 caters to tourists interested in ranch activities, such as horseback rides, buffalo safaris,
4 and helicopter tours of the Grand Canyon. It also conducts cattle and ranching operations
5 and provides helicopter transportation between its property and Las Vegas.

6 In 1974, Grand Canyon Ranch’s predecessor dedicated a right-of-way and
7 easement to Mohave County for the use of a dirt road running across its property. The
8 easement was part of the Old Diamond Bar Road, which provided access to the Western
9 Rim of the Grand Canyon and Hualapai Indian Reservation. In the early 1990’s, the
10 Hualapai Tribe sought federal funds from the Tribal Transportation Program to improve
11 the Diamond Bar Road to facilitate access to a tourist facility the tribe was constructing
12 along the Western Rim. The tribe’s facility competes with Grand Canyon Ranch for
13 tourist business.

14 The United States began examining ways to improve the road, and to that effect,
15 the BLM issued a Final Environmental Impact Statement, which contemplated that the
16 Bureau of Indian Affairs (“BIA”) would construct the new road over the general path of
17 the existing road. The preferred route identified by the BLM had the new road crossing
18 Grand Canyon Ranch several hundred yards south of where of the old road crossed its
19 property. The government tried to obtain an easement from Grand Canyon Ranch to
20 relocate the road, but negotiations between Grand Canyon Ranch, the BLM, and the BIA
21 were initially unsuccessful.

22 On December 4, 2003, the BLM issued a Record of Decision granting the BIA a
23 right of way across BLM land and approving construction of the new road. Grand
24 Canyon Ranch appealed the BLM’s decision and filed a separate suit against Mohave
25 County and the United States government challenging the validity of the easements
26 executed by its predecessor. The parties reached a settlement in 2007 (the “Settlement
27 Agreement”) (Doc. 118-2), which granted the United States a new easement across Grand
28 Canyon Ranch’s property to construct, operate, and maintain a new road. In exchange

1 for an easement across the property, the United States agreed, among other things, to
2 construct certain amenities, including at least three underpasses for “cattle/horse and
3 rider,” with one underpass being located on ranch property. The United States also
4 agreed to build an entrance to the Ranch from the road, with acceleration lanes, turning
5 lanes, signage, and cattle guards. In addition, Mohave County agreed to abandon any
6 prior easement it held for the old road four years after Grand Canyon Ranch conveyed an
7 easement for the new road. The parties agreed that the United States District Court for
8 the District of Arizona would retain jurisdiction to enforce the settlement.

9 But the United States government did not directly undertake construction of the
10 road. Instead, a contract was executed with the Hualapai Tribe for the BIA to provide
11 grant funding and technical assistance in designing the road. The Hualapai Tribe was
12 given the authority to seek bids, award contracts, and oversee construction, but was
13 required to construct the road in accordance with the specifications outlined by the BIA.
14 The finished road would be a contract deliverable to the BIA, meaning it would need to
15 be inspected and approved by the BIA before the federal government accepted the road.

16 **B. First Request for a Preliminary Injunction**

17 Funding for the road was delayed, and it was not until 2012 that the Hualapai
18 Tribe concluded it had sufficient funds to complete the segment of the road that crossed
19 Grand Canyon Ranch’s property. The tribe solicited bids and awarded the construction
20 contract to Fann Contracting, Inc. Construction progressed, and Grand Canyon Ranch
21 quickly became concerned that the tribe did not intend to construct the amenities
22 promised in the Settlement Agreement. In May 2013, Grand Canyon Ranch filed an
23 Emergency Motion to Reopen Case (Doc. 115) (which was granted on May 15 and July
24 1, 2013 (Doc. 121, 162)), and an Emergency Motion for Enforcement of Settlement
25 Agreement (Doc. 116), which it amended to explicitly seek a temporary restraining order
26 and to schedule a preliminary injunction hearing. Those motions alleged, among other
27 things, that the construction plans did not include the amenities required by the
28 Settlement Agreement. The Hualapai Tribe was not brought into those motions, as it was

1 not a party to the original action in 2003, and the Settlement Agreement is with the
2 United States.

3 After those motions were filed, relations between the government parties, Fann
4 Contracting, the Hualapai Tribe, and Grand Canyon Ranch grew more contentious.
5 Under the Settlement Agreement, the County abandoned its easement over the old road in
6 2011, but, because the new road was not complete, the public continued to use the old
7 road after the easement had expired. In May 2013, after the motion to reopen
8 proceedings and enforce the Settlement Agreement, Grand Canyon Ranch erected a toll
9 booth on its property over the old road and started charging tourists an “admission fee”
10 for passage. In response, Defendants began building a temporary bypass road (“Bypass
11 Road”) within the meets and bounds of the easement for the new road. The Bypass Road
12 allowed traffic to bypass the toll booth while the new road was under construction.
13 Grand Canyon Ranch responded by closing the old road altogether, blocking nearly all
14 traffic from crossing through its property.

15 Grand Canyon Ranch then filed its First Amendment to Motion for Temporary
16 Restraining Order and to Set Hearing for Motion for Preliminary Injunction (Doc. 127),
17 arguing (1) that the Bypass Road violated its property rights, (2) that traffic on the
18 temporary road irreparably harmed its hospitality operations, which are adjacent to the
19 construction, (3) that drainage from the Bypass Road was damaging its property, and (4)
20 that the construction plans failed to address the amenities agreed to as part of the
21 Settlement Agreement. The injunction was denied because the Court concluded that
22 Grand Canyon Ranch failed to show that any drainage-related harm from the Bypass
23 Road could be prevented by a preliminary injunction, as the road grading was already
24 constructed. Grand Canyon Ranch also failed to show that the Bypass Road violated any
25 property rights or that the existing plans failed to address the amenities promised in
26 Settlement Agreement. (Doc. 164). Evidence presented on this Application for a
27 Preliminary Injunction, however, shows the Court misunderstood the construction plans
28 at that time.

C. This Application for a Preliminary Injunction

After injunctive relief was denied, relations between the parties deteriorated further. Claiming an oil spill, Grand Canyon Ranch cut off the water supply Fann Contracting needed for construction, forcing Fann Contracting to slow its progress. After a short time, Grand Canyon Ranch allowed Fann Contracting to access the water again but disagreements over the construction continued. On August 20, Grand Canyon Ranch filed this Application for Preliminary Injunction, etc., arguing (1) that the Bypass Road did not meet highway safety standards and was hazardous to drivers; (2) that the amenities, including the cattle and horse underpasses, were not being constructed according to the Settlement Agreement; and (3) that the new road's permanent drainage plan threatened its property. (Doc. 177). A little over a week later, Hualapai Tribal Police arrested Mr. Turner for trespassing off-reservation on BLM property where Grand Canyon Ranch holds a grazing lease and he had a right to be. No charges followed, but the incident suggested a possible breach of the peace and lapse of proper law enforcement. On September 3, 2013, Fann Contracting resumed working with heavy equipment and preparing for blasting activities, raising the possibility that construction activities were being sped up in an attempt to complete certain projects before a court hearing. The Court then set a hearing on the merits of an injunction for September 25, 2013, one week after a scheduled mediation (that proved unsuccessful). (Doc. 194).

At the September 25 hearing, the parties planned to execute a settlement agreement concerning use of the Bypass Road and the old road. Accordingly, Grand Canyon Ranch limited its request for injunctive relief to problems stemming from the amenities promised in the Settlement Agreement and the drainage from the new road. Plans submitted by Grand Canyon Ranch, and testimony from the Government's witnesses, show the original construction plans completely disregarded the amenities required by the Settlement Agreement and that, despite this suit having been filed over three months ago, the plans were not amended to include a version of the required amenities until late August. Despite the modifications, Grand Canyon Ranch's request

1 for relief also persists because the underpasses, turn lanes, entrances, and exits outlined in
2 the amended plans do not comply with the Settlement Agreement.

3 At the time of the hearing, the only installed “cattle/horse and rider” underpass did
4 not meet the specifications of the Settlement Agreement. The underpasses are necessary
5 to allow wildlife, cattle, and horses to traverse the road without crossing traffic. The
6 currently constructed underpass is a corrugated metal pipe, 138 inches in diameter.
7 Grand Canyon Ranch’s expert testified persuasively that the corrugated pipes do not meet
8 the U.S. Department of Transportation Federal Highway Administration’s Equestrian
9 Design Guidebook for Trails, Trailhead, and Campgrounds Standards and that corrugated
10 pipes as built and intended are inadequate for both cattle and horse and rider underpasses.
11 Defendants confirmed they intend to install similar pipes for the two other underpasses
12 and pave the bottom of each pipe with asphalt to create a five-foot-wide walkway.
13 Although the five-foot walkway gives sufficient vertical clearance for a horse and rider,
14 the narrow path, combined with the curved walls of the pipe, creates a circumscribed
15 space with little leeway for horizontal movement. The design leaves no room for
16 additional maneuvers should an animal spook or trip, creating a serious safety hazard.
17 This hazard is magnified by the asphalt paving along the bottom, which Grand Canyon
18 Ranch’s expert convincingly testified is not an appropriate foothold for animals,
19 especially shod horses.

20 The Government’s testimony that other similar configurations are used as horse
21 underpasses is unpersuasive and is rejected. The only photographic example the
22 Government offered in support of its contention—a horse and rider underpass at Papago
23 Park, Phoenix, Arizona, is patently different in every material respect. It is a half-pipe
24 construction, with an earth footing surface the same width as the diameter of the pipe
25 used, creating a wide pathway with a safe foothold. It is difficult to understand how the
26 Government could offer that photograph as an example of what it has built and plans to
27 build in this case.
28

1 Additionally, the grade on the approach to the underpass is seventeen percent.
2 This greatly exceeds the maximum five percent grade permitted by the Department of
3 Transportation Federal Highway Administration's Equestrian Design Guidebook for
4 Trails, making it unsafe for horse and rider, especially a horse bearing an inexperienced
5 rider, as might be expected at a guest ranch. Furthermore, the single horse and rider
6 underpass that has been installed discharges horse and rider into a depression that will
7 pond in rainy weather, thus impairing entry into or exit from the underpass. The
8 Government objects that it would be costly to construct the safe approaches necessary to
9 make the underpasses actually usable. This is an implicit concession that the
10 Government is not planning, and never has planned, to construct the underpasses that
11 good faith requires. Because the road over the underpass has not yet been paved, these
12 defects can be cured in the course of planning an alternative underpass.

13 Along with defects in the underpasses, the evidence presented shows that the
14 promised turn lanes, entrances, and exits leading to Grand Canyon Ranch's property were
15 missing from the original plans and that the updated plans do not account for Grand
16 Canyon Ranch's current configuration, which has expanded since the time of the
17 Settlement Agreement. If a remedy for these defects is not provided before the road is
18 paved, the immense cost of tearing up paved road will render injunctive relief
19 prohibitively expensive.

20 Finally, Grand Canyon Ranch produced convincing evidence that the drainage
21 plan for the permanent road would increase the flow of water onto its property, alter the
22 natural water flow in the area, and likely damage the old road and ranch facilities. The
23 new road alignment runs along the wash, and to save the expense of piping the waters
24 further under the road to replicate the natural flow, the drainage plan under-crosses the
25 new road at the shortest place and casts the water onto the ranch improvements. Water
26 that currently runs into a wash below ranch improvements would be diverted into the
27 wash above ranch improvements.

28

Moreover, in direct response to the scheduling of the injunction hearing, the BIA prepared a new drainage plan two days before the September 25 hearing. Grand Canyon Ranch had not even received the new drainage plan by the time of the hearing. When ruling on Grand Canyon Ranch's First Amendment to Motion for Temporary Restraining Order (Doc. 127) in June, the Court denied relief, in part, because it believed the drainage plan was established and could not be reasonably altered. It became clear at the September 25 hearing, however, that Defendants did not have a drainage plan in place in June and had only just developed the drainage plan in September. The Government concedes that the drainage plan is not fully implemented and could still be modified. If the deficits in the drainage plan are not corrected before the new road is paved, entire sections of the road will need to be torn up, multiplying the costs to repair the defects. Any remedy must be provided before further construction takes place.

III. CONCLUSIONS OF LAW

Preliminary injunctive relief preserves the status quo pending a determination of the action on the merits. *King v. Saddleback Junior Coll. Dist.*, 425 F.2d 426, 427 (9th Cir. 1970). The standard for issuing a temporary restraining order is essentially the same as that for a preliminary injunction. A movant must demonstrate (1) a likelihood of success on the merits, (2) a strong probability of suffering irreparable harm in the absence of preliminary relief, (3) a balance of equities in the movant's favor, and (4) consistency of this injunction with the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 19 (2008); *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion is on the movant, who must make "a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). The "greater the relative hardship to the moving party, the less probability of success must be shown." *Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999).

1 **A. Plaintiff Is Likely to Succeed on the Merits**

2 Grand Canyon Ranch has made a clear showing that it is likely to prevail on its
3 claim that the underpasses and other planned amenities do not comply with the
4 Settlement Agreement. It has also offered convincing proof that the planned drainage
5 system is likely to harm its property in serious ways.

6 **B. Plaintiff Will Suffer Irreparable Harm Without Injunctive Relief**

7 Without injunctive relief, Grand Canyon Ranch will suffer irreparable harm
8 because once the new road is paved, changes to the underpasses and drainage system will
9 become prohibitively expensive. Defective underpasses and excess drainage would
10 seriously jeopardize ranching activities and pre-existing structures. If pavement of the
11 road is completed before the defects are addressed, Grand Canyon Ranch will never
12 obtain compliant amenities or a modified drainage system. Allowing the construction to
13 proceed without remedying the underlying defects would subject Grand Canyon Ranch to
14 gross injustice.

15 **C. Balance of Equities Favors the Plaintiff**

16 Neither party has behaved admirably in this action. Grand Canyon Ranch is
17 justifiably upset by the omissions and errors in construction, but it has chosen, on
18 multiple occasions, to intentionally escalate and exacerbate the conflict. It erected a toll
19 booth over its road when no alternative route was available to drivers, essentially forcing
20 construction of the Bypass Road; it blocked the road entirely for a time, seriously
21 disrupting traffic in the area; and it shut off the water supply to Fann Contracting with
22 thin justification, forcing the contractor to delay certain projects. Grand Canyon Ranch's
23 antagonizing behavior, however, does not rid Defendants of their obligations under the
24 Settlement Agreement.

25 The disputed portion of the road is built on an easement granted to the United
26 States by a private land owner with explicit obligations to the dominant estate. The
27 United States cannot abdicate its responsibility for its easement or its obligations under
28 the Settlement Agreement by delegating the construction of the road to the Hualapai

1 Indian Tribe. Even if the amenities had not been intentionally excluded from the original
2 plan, Defendants were on notice the plans were deficient when this action was filed in
3 May, but still took more than three months to add the required amenities. Defendants
4 have failed in their obligations to honor the Settlement Agreement and to ensure
5 construction proceeds in a way that protects the rights of the easement grantor. The
6 balance of equities favors Grand Canyon Ranch.

7 **D. Temporarily Restraining the Construction is in the Public Interest**

8 Temporarily restraining the road construction serves the public interest by
9 ensuring the government does not disregard property rights. The costs of temporarily
10 staying road construction are minor compared to the costs of reconstruction later.

11 **E. Nature of Relief**

12 Because Grand Canyon Ranch has demonstrated that it is likely to suffer
13 permanent and irreparable harm if a portion of the New Diamond Bar Road construction
14 is not restrained, a temporary and limited restraining order will issue against Defendants.
15 Although it was initially contemplated that any relief granted after the September 25
16 hearing would take the form of a preliminary injunction, evidence showed that a decision
17 on preliminary injunctive relief should be deferred. This temporary restraining order
18 does not function as a final ruling on the merits, but, instead, preserves the status quo
19 until preliminary injunctive relief can be more fully considered at a hearing set for
20 October 29, 2013. *See Northern Stevedoring & Handling Corp. v. Int'l Longshoremen's*
21 *& Warehousemen's Union, Local No. 60*, 685 F.2d 344, 347 (9th Cir. 1982) (holding that
22 a temporary restraining order is equivalent to a preliminary injunction only if it “decides
23 the merits of a case”).

24 This order will only halt construction that will make it difficult to adjust the
25 underpasses, entrance amenities, or drainage system and will last only until the harms can
26 be more fully adjudicated at the hearing set for October 29. While the restraining order is
27 in place, no paving is to occur over or within one hundred feet of any of the three
28 underpasses, over any areas adjacent to Grand Canyon Ranch's improvements, or over

1 any portion of the road that would make it more difficult to modify the disputed drainage
2 system. That is, no paving is to occur between the existing disputed culvert and where
3 the water it now diverts would enter the wash downstream if there were no diversion.
4 This limited portion of the construction will be enjoined only until October, 29, 2013,
5 when a preliminary injunction hearing will be held to consider the precise terms of
6 underpass construction and the disputed drainage construction.

7 IT IS THEREFORE ORDERED that this temporary restraining order shall bind
8 the Defendants and their officers, agents, servants, employees, attorneys, and all other
9 persons who are in active concert or participation with them and who receive actual
10 notice of this order, whether by service of process or otherwise.

11 IT FURTHER IS ORDERED that, until October 29, 2013, or otherwise agreed by
12 the parties, (a) Defendants are temporarily restrained from installing any new cattle and
13 horse underpasses, or cattle/horse and rider underpasses; (b) Defendants are temporarily
14 restrained from paving the new road over or within one hundred feet of any underpasses
15 and from paving any area between the existing disputed culvert and where the water it
16 now diverts would enter the wash downstream if there were no diversion; and (c)
17 Defendants are temporarily restrained from paving areas of the New Diamond Bar Road
18 adjacent to Grand Canyon Ranch's improvements;

19 IT IS FURTHER ORDERED that, on or before 5:00 p.m. on October 15, 2013,
20 Plaintiff shall submit to Defendants its proposed locations and specifications for the cattle
21 and horse underpasses, entrances, and turn lanes provided for under the Settlement
22 Agreement, and any comment on Defendants' drainage studies, reports, and plans
23 ("Plaintiff's Proposals");

24 IT IS FURTHER ORDERED that, on or before 5:00 p.m. on October 21, 2013,
25 Defendants shall respond to Plaintiff's Proposals with Defendants' comments and/or
26 alternative locations and/or specifications ("Defendants' Proposals");

27 IT IS FURTHER ORDERED that the parties' respective engineering experts shall
28 meet in person on or before October 23, 2013, to discuss and, in good faith, attempt to


1 resolve any differences in Plaintiff's Proposals and Defendants' Proposals. The meeting
2 may not be attended by more than one representative each from the Hualapai Tribe and
3 Fann Contracting, Inc., or the Defendants;

4 IT IS FURTHER ORDERED that the parties' respective principals and
5 engineering experts shall meet in person on October 24 or 25, 2013, to discuss and, in
6 good faith, attempt to resolve any remaining differences in the Proposals;

7 IT IS FURTHER ORDERED setting a hearing on the application for preliminary
8 injunction on October 29, 2013, at 9 a.m. to address any remaining disputes between the
9 parties related to the locations and objective professional construction standards for: (a)
10 the drainage studies, plans, reports, construction, and culverts as they may impact
11 Plaintiff's property; (b) the cattle and horse and/or cattle/horse and rider underpasses as
12 provided for in the Settlement Agreement; and (c) the turn lanes and entrances on
13 Plaintiff's property as provided for under the Settlement Agreement;

14 IT IS FURTHER ORDERED that, pursuant to Rule 65(c), this temporary
15 restraining order is conditioned upon Plaintiff posting a bond of \$50,000.00 to cover the
16 costs and damages incurred by Defendant if Defendant is found to have been wrongly
17 restrained.

18 Dated this 11th day of October, 2013 at 4:45 p.m. in Phoenix, Arizona.

19
20
21 
22 _____
23 Neil V. Wake
24 United States District Judge
25
26
27
28